



**U.S. Department of Justice**

*United States Attorney  
Southern District of New York*

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*86 Chambers Street, 3rd Floor  
New York, New York 10007*

October 8, 2013

**BY ECF**

The Honorable Paul A. Crotty  
United States District Judge  
Daniel Patrick Moynihan U.S. Courthouse  
500 Pearl Street  
New York, NY 10007-1312

Re: *Residents for Sane Trash v. USACE*, 12 Civ. 8456 (PAC)  
*Kellner v. USACE*, 12 Civ. 8458 (PAC)

Dear Judge Crotty:

I write in response to plaintiffs' letter, dated October 7, 2013, requesting an emergency conference in the above-referenced cases at which they intend to seek an order staying the City of New York from proceeding with certain construction activities for the new marine waste transfer station (the "MTS") at East 91<sup>st</sup> Street. The Court has scheduled a conference for October 10, 2013, at 3:00 p.m. Because the United States Army Corps of Engineers ("USACE") is currently not in a position to respond substantively to plaintiffs' arguments regarding their likelihood of success on the merits due to the shutdown of the federal Government, and in light of plaintiffs' own delay in seeking any injunctive relief, any application by plaintiffs for a stay of certain construction activities should be denied. For the reasons further explained below, we request that no alteration of the status quo be imposed at this time, and that USACE's deadline for submitting summary judgment briefing continue to be tolled pursuant to the order entered by Chief Judge Preska on October 1, 2013.

In response to the lapse in funding to the United States Department of Justice ("DOJ"), on October 1, 2013, Chief Judge Preska issued an Order staying all civil cases in which this Office has appeared as counsel of record for the United States or its agencies, including this case (the "October 1, 2013, Order"). The October 1, 2013, Order also tolls all court deadlines in all such civil cases "for a period of time equal to the number of calendar days between October 1, 2013, and the date the President signs into law a budget appropriation that restores Department of Justice funding." This includes the deadlines for summary judgment briefing in these cases, which had previously been scheduled to begin on October 11, 2013, and to be completed on December 20, 2013. Both AUSA Christopher Connolly, who is assigned to defend this case, and the Chief of our Office's Environmental Protection Unit Robert Yalen, who is supervising this

case, are currently furloughed due to the lapse in DOJ funding. The Department of Justice has instructed that, under the law, furloughed AUSAs are prohibited from working during the shutdown, even as volunteers.

Plaintiffs propose providing the Court immediately with “a full set of papers that we intend to serve and file in support of our motion for summary judgment,” which they claim will “demonstrate a sufficient likelihood of success on the merits of plaintiffs’ claims to justify a stay of construction.” Letter from Jeffrey L. Braun to the Court, dated October 7, 2013, at 3. The City has also stated its willingness file its summary judgment papers on October 11, 2013, noting that they will “assist the Court in determining the likelihood of success on the merits of Plaintiffs’ environmental review claims.” This question of plaintiffs’ likelihood of success on the merits indisputably goes to the very heart of the claims before the Court in these cases, and the USACE is entitled to lay out its case and be heard on these matters. While I will attend the conference on October 11, 2013, the current lapse in DOJ funding will prevent this Office from providing substantive briefing on these issues in a timely manner as the two attorneys who have been assigned to this matter since it was filed nearly one year ago are currently on furlough.

Furthermore, injunctive relief is typically granted because “there is an urgent need for speedy action to protect the plaintiffs’ rights.” *Citibank N.A. v. Citytrust*, 756 F.2d 273, 276. “Delay in seeking enforcement of those rights . . . tends to indicate at least a reduced need for such drastic speedy action.” *Id.* Plaintiffs filed complaints in these two actions nearly one year ago. More than eight months ago, the City provided plaintiffs with a summary of the construction milestones in the MTS project. This summary indicated that Phase I (or Milestone 1), which includes completion of the MTS foundations and pier platform, would be complete by March 2014, when Phase II of the project was scheduled to begin. *See* Letter from Assistant Corporation Counsel Carrie Noteboom to Jeffrey L. Braun, dated January 31, 2013, provided as Exhibit 1 to the Letter from Assistant Corporation Counsel Carrie Noteboom to the Court, dated October 7, 2013. With full knowledge of these anticipated construction deadlines, plaintiffs agreed in July 2013, to a summary judgment briefing schedule in which briefing would not be completed until December 2013.

Today represents the eighth day of the federal Government shutdown. If DOJ funding were to be restored today, pursuant to the tolling of deadlines provided for in the October 1, 2013, Order, summary judgment briefing would be complete on December 28, 2013. As of today, plaintiffs have not shown irreparable harm —“the single most important prerequisite for the issuance of a preliminary injunction,” *Reuters Ltd. v. United Press Int’l, Inc.*, 903 F.2d 904, 907 (2d Cir. 1990) (internal quotations and citations omitted)—due to a delay of the summary judgment briefing schedule by eight days. While we cannot predict when Congress will restore DOJ funding, plaintiffs have not demonstrated that a delay of even several additional weeks would cause irreparable harm to plaintiffs due to the extension of summary judgment briefing beyond December 20, 2013, to some date in January 2014. Plaintiffs should not be permitted to use the federal Government shutdown as a hook on which to hang a delayed application for injunctive relief, particularly in light of this Office’s inability to respond more substantively to any such application in a timely manner.

Accordingly, we respectfully request that the Court deny any application by plaintiffs for a stay of certain construction activities at the MTS, and that the deadlines for summary judgment briefing continue to be tolled pursuant to the October 1, 2013, Order.

Respectfully,

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United States Attorney

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